(3)

No. 03-489

Supreme Court, U.S.
FILED
NOV 24 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD B. HELFRICH, M.D.,
and DANIEL B. NELSON, M.D.,

Petitioners,

v.

CARLE CLINIC ASSOCIATION, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

J. STEVEN BECKETT
Counsel of Record
BECKETT & WEBBER, P.C.
508 South Broadway
P.O. Box 17160
Urbana, IL 61803-7160
(217) 328-0263

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

REPLY BRIEF FOR PETITIONER..... 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Scott v. City of Chicago, 195 F.3d 950 (7th Cir. 1999)..... 5

Vidimos, Inc. v. Laser Lab Ltd., 99 F.3d 217 (7th Cir. 1996)..... 5

REPLY BRIEF FOR PETITIONER

I. Respondent's Statement Of The Case Contains A Number Of Factual Inaccuracies And Mischaracterizations.

Portions of Respondent's Statement of the Case, such as its accusations that Petitioners cited outside the administrative record and of committed discovery violations, are so misleading as to require direct comment.

When Respondent filed its initial pleading in this case – a Motion to Dismiss – it put forward a set of documents which it then pronounced as "the" administrative record. This "definitive" record was deficient, failing even to include the summary plan descriptions at issue, documents that Respondent always acknowledged in form if not in substance. On page five of its Brief in Opposition, Respondent continued to misstate the facts, alleging that Petitioners never submitted any documents to Respondent's administrators for review. Yet, Respondent's Plan Administrators acknowledged that they received a number of documents submitted by Petitioners' attorneys including the summary plan descriptions containing the promises now at issue. Nevertheless, Petitioners' *Summaries* were not included in Respondent's version of the administrative record.

The District Court also never identified what documents made up "the" administrative record, nor did it ever hold that Respondent's version of the record was definitive. Petitioners submitted what they believed to be the administrative record with their Summary Judgment Motion. The District Court considered *all* of the documents Petitioners submitted with its Summary Judgment Motion

and never stated that any of these documents were outside the administrative record.

In addition, when the District Court denied Respondent's Motion to Dismiss Petitioners' federal claims, it adopted the Report and Recommendation of the Magistrate Judge, stating that Petitioners' claims were about *Respondent's* promises to Petitioners rather than the Plan Administrator's interpretation of the current Plan document. As such, Petitioners sought discovery, in good faith, to further establish the factual circumstances surrounding those promises. Unfortunately, the District Court denied discovery in this cause.

Petitioners sought review of the denial of discovery in the Court of Appeals. That Court ignored this issue in its decision, except to state that Petitioners "earned the trial court's enmity" by noticing a first round of depositions which were barred by the trial court and by then noticing a second set of depositions. (Court of Appeals Decision at p. 4) In fact, Petitioners noticed *one* deposition during this entire case. When the trial court subsequently entered a protective order barring discovery, Petitioners *never* attempted to reset this or any other deposition. Although the Court of Appeals erred by disregarding the issue, Petitioners did not seek review at this stage, and instead brought only the issues of greatest national importance before this Court.

Petitioners refer this Court to the Statement of the Case included in their Petition for a further – and accurate – recitation of the relevant facts in this case.

II. There Is A Recurring Conflict Among The Circuits On The Application Of Estoppel To ERISA Claims.

In their Petition, Petitioners provided this Court with a detailed analysis of the uneven application of estoppel principles in ERISA cases between the Circuits with supporting case law. In its Brief in Opposition, Respondent resorted to a familiar tactic: drastically redefining the issues and then arguing Petitioners had cited no authority to support them. For example, Respondent suggests there is a difference between a case with one ERISA Plaintiff and a case that is brought by two such persons. Incredibly, Respondent actually argued in its initial Brief to the Court of Appeals that cases cited by Petitioners in support of their estoppel claim were inapplicable because each was brought by only one plaintiff. In its Brief to this Court, Respondent again revised the issues, now suggesting that this Court should only grant review if there is a split among the Circuits over whether estoppel should be applied in cases where employers had promised benefits that exceed Internal Revenue Code caps. This strained focus obscures a large gap in ERISA jurisprudence, which, if not checked by this Court, will enable employers to promise unlimited pension benefits with impunity.

In its Brief, Respondent argued that most of the cases cited by Petitioners involved welfare plans, rather than pension benefits, and therefore were not evidence of a split in the Circuits' treatment of estoppel. Respondent further argued against review by stating that the Petitioners cite no case law for the proposition that estoppel should be applied where a plan's actuarial soundness or funding would be threatened.

However, as Petitioners demonstrate on pages seven and eight of their Petition, Respondent's actuarial soundness and tax-exempt status of Respondent's Plan have nothing to do with this case and would not have been compromised if this Court granted relief. When the Court of Appeals held that making Respondent honor its promises would compromise Respondent's actuarial soundness, it did *so without support from anywhere in the record.* Respondent's renewed attempt to paint Petitioners' claims with a dark brush is mere hyperbole.

Respondent further argued that cases cited by Petitioners were inapplicable because the summary plan descriptions Petitioners relied upon were too informal to be enforced. However, it is uncontradicted in the record that the summary plan descriptions relied upon by Petitioners were the only documents *ever* distributed by Respondent prior to 1996. These summary plan descriptions made no reference to limitations imposed by tax regulations, even though, as cited on page three of Respondent's Brief, the Plan document itself contained such limitations. The summary plan descriptions contained other provisions outlining possible limitations on benefits, but omitted any reference to tax code limitations.

Notwithstanding Respondent's efforts to parse the case law to its purpose, this Court should review this issue precisely because the Circuits are applying the doctrine of estoppel inconsistently. This Court's intervention is required to inform the Circuits whether the doctrine of estoppel applies to ERISA cases *and* whether a distinction should exist between pension plans and welfare benefit plans.

III. Petitioners Established All Of The Elements Of Estoppel.

In its Brief, Respondent argued that Petitioners raised their estoppel argument for the first time at the summary judgment stage. Federal courts are notice pleading jurisdictions and a complaint must only contain a short and plain statement of the claim sufficient to give the defendant fair notice of the claim. *Scott v. City of Chicago*, 195 F.3d 950, 951 (7th Cir. 1999). Moreover, "a complaint need not spell out every element of a legal theory to provide notice." *Id.* Petitioners' Complaint provided the factual basis for each and every legal theory advanced by their Motion for Summary Judgment.

Respondent cannot argue that Petitioners' theories are a surprise when it abstained from (and actively fought against) discovery which would have led to a greater understanding of Petitioners' claims. "If [a defendant] wished to minimize uncertainty concerning the scope of [the plaintiff's] claims, it could have served contention interrogatories." *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996). Indeed, in *Vidimos*, the Seventh Circuit held that a complaint does not have to mention the term "promissory estoppel" where the complaint "fairly breathes promissory estoppel." The Court stated, "[t]he Federal Rules of Civil Procedure do not require a plaintiff to plead legal theories." *Id.* Petitioners refer this Court to pages twelve through fourteen of their Petition for a detailed analysis of how each element of estoppel was proven.

IV. In Their Petition, Petitioners Argued That The Seventh Circuit Abolished Its Previous Modest Presumption In Favor Of Attorney's Fees In Favor Of A New Test.

Contrary to Respondent's assertion, Petitioners did not argue that the Seventh Circuit created a presumption in favor of attorney's fees in its decision. Rather, Petitioners argued that the Seventh Circuit eliminated what had been a modest presumption and created a new standard wherein plaintiffs would always pay defendant's attorney's fees *in any case* where the defendant faced a substantial monetary judgment.

Respondent also asserted that Petitioners had waived any objection to the attorney's fee presumption. Petitioners argued an award of attorney's fees was inappropriate in this cause to both the District Court and Court of Appeals. In their Petition, Petitioners argued not only that the Seventh Circuit had established a new standard, but Petitioners also argued that this Court should abolish the presumption in favor of attorney's fees supported by a minority of Circuits.

Respondent attempted to sidestep the issue presented by Petitioners, arguing that the attorney's fees issue was a factual question, and that these factual findings should not be disturbed by this Court. However, in reviewing this case, both the District Court and Seventh Circuit operated under a presumption that attorney's fees should be awarded, tainting any factual analysis the Courts may have performed. This Court should note that Respondent's have not denied the Circuits are in conflict about whether a presumption in favor of attorney's fees exists, thereby admitting such a conflict.

Respondent has made no reference to any of the practical implications of the Seventh Circuit's new standard as identified by Petitioners, instead trying to distract this Court from the true effect of the Appellate Court's ruling. The Seventh Circuit's ruling is so broad in scope that in every ERISA case in the Seventh Circuit where a defendant faces a significant judgment, an unsuccessful plaintiff will be required to pay that employer's attorney's fees.

V. The Court Of Appeals Erred In Affirming The District Court's Award Of Attorney's Fees.

If the Seventh Circuit had reviewed the District Court's award of attorneys' fees and costs by applying those methodologies used throughout the United States, it would have found the District Court's ruling to be in error. Using the "five factor test", as referenced in Respondent's Brief in Opposition, the District Court clearly abused its discretion by granting Respondent's Petition for Attorney's Fees and Expenses.

The first factor to consider is the offending parties' culpability or bad faith. Considering Respondent's written promise of benefits and acknowledgment of those promises, it was reasonable for Petitioners to believe that their benefits had been wrongfully withheld by the Respondent. Perhaps most remarkable, the Seventh Circuit made a factual finding that Respondent had promised its employees the benefits sought by Petitioners in this suit. Respondent spent the better part of a decade trying to avoid having to make good on its promises. If there is bad faith to be found in this cause, it rests with the Respondent. Petitioners' good faith belief in their claims was also

bolstered by the Recommendation of the Magistrate and the District Court's approval of that Recommendation denying Respondent's Motion to Dismiss this case.

As to the second factor, Petitioners' ability to satisfy an award of attorney's fees, Respondent argued that because Petitioners were doctors they should be ordered to pay Respondent's fees. There was no evidence in the record regarding Petitioners' income or assets. Even though Petitioners in this case at bar are physicians, the judgment that they should pay over $80,000 each in attorney's fees (before adding Respondent's attorney's fees on appeal) is punitive.

The third and fourth factors to consider are whether or not an award of attorney's fees will deter other persons acting under similar circumstances and whether the members of the Pension Plan as a whole were benefited. In its Petition for Fees, Respondent argued the District Court should "send a clear message that similar claims ought not be brought." It was wrong for the Court to "send the message" that employees must accept whatever their employers are willing to give them, regardless of past promises, or they will lose everything, *and* pay the employer's attorney's fees.

The fifth element to consider is the merit of the parties' position. Petitioners again refer this Court to the Recommendation of the Magistrate adopted by the District Court as evidence that, although their cause of action was not ultimately successful, it possessed merit.

An analysis under the substantially justified, good faith test would end in the same result. The Seventh Circuit failed to apply either of these tests, instead adopting a new test whereby a plaintiff must pay a defendant's

attorney's fees if the defendant potentially faced a large judgment.

CONCLUSION

For the foregoing reasons, and for those in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

J. STEVEN BECKETT
Counsel of Record
BECKETT & WEBBER, P.C.
508 South Broadway
P.O. Box 17160
Urbana, IL 61803-7160
(217) 328-0263